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Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

WADE VINCENT SHANG

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Wade Vincent Shang
In Pro Se
Wade Vincent Shang
103 Parkgrove Drive
South San Francisco, Ca. 94080
(415) 722-1638

April 10, 2007

QUESTIONS PRESENTED

1. Whether the Justice Department Manual stating definite requirements for government introduction of evidence and burden of proof, which are contrary to common law and ninth circuit trial requirements of evidence and burden of proof; which Manual is "heavily relied upon" by defense counsel (as noted by the district court, Pet. App. 9a), can be disregarded by the Justice Department at trial.

2. Whether evidence described as "downright inaccurate" by the *Shang* appeals court, Pet. App.17a, and insufficient as defined by *Merritt v. United States*, 327 F.2d 820 (5th Cir. 1964), which escapes the adversarial system of justice and cross-examination, and which also fail to "establish the government case", within the meaning of *Holland v. United States* 348 U.S. 121, can obtain a criminal conviction.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, this petitioner states as follows that it has no parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

RULE 29.6 STATEMENT.....ii

TABLE OF AUTHORITIES.....v

OPINIONS AND JUDGMENT BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....2
- A. The trial.....4
- B. The appeal.....9
- C. The habeas corpus petition.....12

REASONS FOR GRANTING THE PETITION.....15

I. The Circuits Are Divided And The Conduct of Trial And The Conduct of Appellate Counsel Present Reoccurring Issues of Great Practical Importance.....17

- A. The Circuits Are Divided.....17
- B. The Ineffective Assistance of trial Counsel Presents A Recurring Issue of Great Practical Importance.....18
- C. The Ineffective Assistance of Appellate Counsel Presents A Recurring Issue of Great Practical Importance.....20

TABLE OF CONTENTS
(Continued)

II. This Case Squarely Presents the Fundamental Issue of Reasonable Reliance On The Department of Justice Manual And of Judicial Supervision of the Criminal Justice System to Maintain Standards of Procedure And Evidence When Confronted With Insufficient Evidence.....21

A. This Is A Case In Which The Due Process Clause Is Implicated When Defendant's Trial Counsel Reasonably Relies On the Department Of Justice Manual and Defendant Has Suffered Substantially Because of Misconduct By The Justice Department.....21

B. Irrespective of Reliance Issues Supreme Court Supervision of the Administration Of The Criminal Justice System Is Required To Maintain Standards Of Procedure And Evidence When Confronted With Insufficient Evidence.....23

III. The Decision Below Is Incorrect.....27

CONCLUSION.....29

TABLE OF AUTHORITIES

CASES **Page**

Cox v. Louisiana
379 U.S. 559 (1964).....23

Holland v. United States
348 U.S. 121(1954).....i,4,5,15,17,18,24,25,26,28

McNabb v. United States
318 U.S. 332 (1942).....26,27,29

Merritt v. United States
327 F.2d 820 (5th Cir. 1964), *rhg. denied*
.....i,6,7,8,9,10,11,12,14,15,17,18,19,20,21,24,25

Raley v. Ohio
360 U.S. 423 (1958).....22

Rompilla v. Beard
545 U.S. 374 (2005).....18

Simmons v. United States
348 U.S. 397 (1954).....23

United States v. Keller
523 F.2d 1009 (9th Cir.1975).....10,11,12,19

Washington v. United States
357 U.S. 348 (1957).....26

Wiggins v. Smith
539 U.S. 510 (2003).....18

TABLE OF AUTHORITIES
(Continued)

Page

CONSTITUTION, STATUTES, RULES, AND LEGISLATION

U.S. Const. Art I, Section 9, Clause 2.....2

U.S. Const. AMEND. V.....2

U.S. Const. AMEND. VI.....2,12

Fed. R. Crim.P. 29.....5,8,9,20

Justice Department Criminal Tax Manual.....passim

MISCELLANEOUS

American Bar Association, *ABA Standards for Criminal Justice 3rd Edition* (1993).....18,19,20

PETITION FOR A WRIT OF CERTIORARI

The Justice Department *Criminal Tax Manual* sets forth trial evidence and procedure and while in trial, defense counsel relies heavily on the *Manual* and does not cross examine specific statements of the primary government witness nor does he set forth other affirmative evidence based upon the *Manual*'s statements that it was the government's evidence and procedure. Petitioner Shang respectfully petitions for a writ of certiorari to review the decisions of the United States Court of Appeals for the Ninth Circuit upholding the opinion by the District Court for the Northern District of California finding that defendant was represented effectively, and that the unknown evidence that was not revealed at trial was of no significant consequence.

OPINIONS AND JUDGMENT BELOW

The opinion of the court of appeals in the habeas corpus (Pet. App.1a-3a) is reported at 2007 *U.S. App. Lexis* 2189 9th Cir. Cal. (Jan. 29, 2007). The opinion of the district court denying the habeas corpus (Pet. App. 4a-14a) is unreported. The opinion of the appeals court in the motion for reconsideration of the appeal (Pet. App.15a) is unreported. The opinion of the appeals court of the direct appeal (Pet. App. 16a-18a) is unreported. The opinion of the district court in the order denying post-trial motions (Pet. App. 19a-30a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article I, Section 9, Clause 2 of the United States Constitution which provides in pertinent part:

"The Privilege of the Writ of Habeas Corpus shall not be suspended ..."

The case also involves the Due Process Clause which provides that: "No person shall ... be deprived of life, liberty, or property, without due process of law ...:" CONST. AMEND. V.

The Sixth Amendment of the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. CONST. AMEND. VI.

STATEMENT OF THE CASE

First, this case raises important, recurring questions relating to the effective assistance of defense counsel at trial who relies upon evidence procedure and burden of proof representations contained in the *Justice Department Criminal Tax Manual* and the appellate attorney confronted by such reliance.

Second, it raises equally important, recurring questions relating to the introduction of inaccurate evidence based upon government testimony stating the insufficiency of the evidence. The *Justice Department Criminal Tax Manual* specifically states the "lesson" prohibiting the aforementioned which was then disregarded by the prosecution but relied upon by the defense trial attorney to the detriment of defendant. The *Manual* evidence and burden of proof pronouncements are inconsistent with common law and the ninth circuit.

The first question relating to the effectiveness of defendant trial counsel concerns his reliance on fifth circuit law adopted and summarized in the *Justice Department Criminal Tax Manual* during a trial conducted in the ninth circuit where such reliance directly impacted introduction of crucial defense trial evidence. Defense trial counsel did not introduce evidence to correct or rebut government evidence and allegations in two distinct and separate years of indictment, because the *Manual* adoption of the fifth circuit evidence and burden of proof standards precluded such introduction. Trial counsel stated this in closing argument to the jury that the burden of proof "remained with the government" and "the burden never shifts to the defendant". Trial counsel then summarized a motion for acquittal within the framework of the fifth circuit law adopted by the *Justice Department Manual*, after preserving the motion for judgement of acquittal at the close of the government case. The motion for judgment of acquittal was denied.

As part of the first question, the effectiveness of an appeal counsel becomes crucial in appealing the record. Appeals counsel was in partnership with the trial attorney and knew from the record that trial counsel had not relied on the law of the trial circuit, but had instead relied upon the fifth circuit law adopted by the *Justice Department Criminal Tax Manual.* Knowing that his partner colleague had not applied the law of the trial circuit , appeals counsel did not appeal the trial record of counsel's reliance on authority outside the trial circuit or the burden of proof issue which relied upon that authority. These out of circuit authorities have never been addressed in the ninth circuit.

The first question is important and recurring because the *Justice Department Criminal Tax Manual* pronouncements adopt and embody the fifth circuit law which is contrary to common law. It delegates evidence and burden of proof between government and defendant at trial. It is a manual that is available nationwide and

defense attorneys rely on the *Manual* in representing defendants.

This case illustrates how the *Manual* eviscerates the adversarial system of justice.

The second question is of equal importance and undermines this entire case. This question is the use of crucial evidence which by ninth circuit appeals court standards is "downright inaccurate", when the evidence is also fundamentally insufficient in order to obtain a criminal conviction. The evidence also does not meet the *Manual* standard of evidence. Therefore it is necessary for this court to intervene to maintain proper standards of evidence and trial procedure either through implementation and upholding *Manual* requirements or otherwise as required by *Holland v. United States* 348 U.S. 121, so that the use of such evidence at trial does not produce a miscarriage of justice.

Adherence by the government to the *Manual* standard of evidence and burden of proof is important for recurring future prosecutions because the *Manual* is used by the government to determine the evidence necessary to prosecute. The *Manual* evidence and burden of proof pronouncements are therefore crucial for the government because of its effect in recurring trials and in future government prosecutorial determinations and if followed, should reduce unjust prosecutions.

This case illustrates that truth.

A. The Trial

Defendant was accused of attempted tax evasion for five separate years from 1995 to 1999. The government method of proof was the "net worth method".

The method in concept is simple. Assets less liabilities equals net worth. The government first establishes the net worth of the taxpayer at the beginning and end of each tax period in question. Non-deductible expenditures

are added back and all known nontaxable income is subtracted. The resulting figure is compared to the reported taxable income on the taxpayer's return. If the figure is greater than that reported by the taxpayer, the government claims the difference is unreported income. *Holland, 348* U.S. at 126.

At trial, Special Agent Arlette Lee who was in charge of the investigation and prepared the net worth schedules, testified that it was the first time she had ever conducted a net worth investigation and she stated on cross-examination (TR 593) as follows:

Q. So you didn't complete a thorough investigation of his entire liabilities?
A. There are some that are missing.

Q. And you did not conduct a thorough investigation of his assets; isn't that true?
A. That's possible.

Neither government re-direct, nor defense counsel examination, inquired or discovered the stated liabilities or possible assets that Agent Lee stated were missing. (Pet. App. 22a).

Defense trial counsel presented a Rule 29 Motion at the close of the government case and orally stated,

> "I respectfully move the court to grant judgment at this time... In fact, the testimony of Arlette Lee seemed to me to make it pretty clear that she had not accounted for all assets and could not testify under oath that she had done so, nor had she accounted for all liabilities...With the state of the record, with her testimony as it is, that she has not accounted, or could not say she had accounted for all assets,

> and could not state she accounted for all liabilities... I believe that the net worth computation ... as a matter of law, incomplete and should be stricken." (TR 817, 818).

In the closing statement to the jury, defense trial counsel stated that , "the burden remains entirely in this case from beginning to end on the government" , and that, "the burden never shifts to the defendant". Trial counsel then summarized all five indictment years into a one baseball game analogy pointing out many specific errors in the investigation as strikes. (TR 977).

In a Supplemental Memorandum in Support of a Motion for Judgment of Acquittal trial counsel stated:

> "The Defendant relies on *Merritt v. United States*, 327 F.2d 820 (5th Cir. 1964) rhg. Denied 329 F.2d 757 (5th Cir. 1964) to support his position that as a matter of law the Government has failed to establish a *prima facie* case where it has failed to account for all of the Defendant's **known** assets and liabilities with reasonable certainty." (emphasis supplied by trial counsel).

The *Merritt* special agent testimony is:

> Q. * * As a matter of fact don't you know... this taxpayer owned assets and had assets that you did not take into account in this case?
> A. He has some other assets, yes sir.

Id. Merritt 327 F.2d 821.

Neither counsel in the *Merritt* case asked the special agent what these other assets were. *Id.*

The *Merritt* case appeal is based on testimony of the government special agent who drew up the net worth schedule. *Id.* The language is exactly the same, but less egregious compared to the testimony at bar. It is less egregious because Agent Lee referred to both assets and liabilities in her testimony, not just assets. The *Merritt* fifth circuit court of appeals reversed the conviction of the defendant and stated that,

> "The disposition of this appeal, then, is dependent upon whether the burden of going forward with the evidence was on the Government or the Defendant. We conclude that the burden was on the Government to identify these assets and to justify its failure to include them in the net worth schedule." *Id.* at 822.

Defense trial counsel in the written Motion for Judgment of Acquittal, cited the *Justice Department Criminal Tax Manual* at pages 31-26 which analyzes the *Merritt* testimony and describes "the lesson" of *Merritt*. The *Manual* as quoted by defense counsel states:

> "The lesson is clear – the net worth computation must be reviewed in depth with the special agent and testimony developed to establish that the starting point includes, to a reasonable certainty <u>all of the defendant's assets and liabilities</u>. If the agent had a good reason for leaving items out of the net worth schedules, then the agent should be asked about this <u>on direct examination</u>, along with questions as to what these items are and why they were

omitted." (Emphasis supplied by trial counsel).

Trial counsel ended the Motion for Judgment of Acquittal with the final sentences:

> "Here as in *Merritt*, the government clearly failed to conduct a thorough investigation of Defendant's assets and liabilities as of each relevant date in the prosecution years. The Government, thus, as a matter of law, did not establish with a reasonable certainty Defendant's assets and liabilities, and consequently did not meet its burden of proving that the apparent increase in Defendant's net worth was attributable to unreported income. The Government's proof did not exclude the reasonable possibility of the existence of assets and liabilities not included in its net worth computations. Accordingly, the Government should not have been allowed to rely upon the net worth method of proof, and defendant's Motion for Judgment of Acquittal should accordingly be granted."

The Motion for Judgment of Acquittal was denied by the district court which found that defense trial counsel had indeed relied on *Merritt*. Pet. App. 21a. In denying the motion, the district court concluded that, "There was sufficient evidence on this record for the jury to conclude that the government had conducted a thorough investigation of Shang's assets and liabilities and established his net worth with reasonable certainty on the counts of conviction." *Id.* at 22a. The "clear lesson" of *Merritt* is simply stated in the *Manual*. What is inside the Special agent's head is not necessarily what is expressed in the "sufficient evidence on this record".

The district court did not address the *Manual* at all. *Id.* 19a - 30a.

The jury acquitted defendant of tax evasion for two of the five tax years of 1995 and 1997. *Id.* at 19a.

B. The Appeal

The appeals attorney was a partner in the same Texas law firm as the trial attorney. The appeal attorney brief and oral argument did not make any mention of the failure of the government agent testimony to identify what she said was missing. This included a failure to state the trial attorney reliance on the "lesson" language adopted from the fifth circuit *Merritt* case; or an analysis of the significant same testimony of *Merritt*; or that *Merritt* supported the position that the government failed to establish a prima facie case; or that the government did not meet its burden of proof by identifying what she stated was missing; or that the *Justice Department Criminal Tax Manual* adopted *Merritt*; or that the trial attorney relied on the *Manual*. The appeals attorney by doing so , totally disregarded the burden of proof issue which the trial attorney stated in the trial record, "never shifts to the defense", when the government fails to ask what the agent said was missing from the calculations.

This was a crucial omission on appeal of the fundamental Agent Lee burden of proof issue contained in the government's own *Manual* in the "lesson". As stated by the trial attorney's analysis of the Agent Lee testimony in the oral Rule 29 Motion to Acquit:

> "... the testimony of Arlette Lee seemed to me to make it pretty clear that she had not accounted for all assets ... nor had she accounted for all liabilities ..."

The appellate decision in *Shang*, cited only three ninth circuit decisions. Pet. App. 16a -18a. One of the

decisions was not cited or referred to by defense trial attorney or defense appeals attorney in any document or in anyway. This case cited by the appeals court was *United States v. Keller*, 523 F.2d 1009 (9th Cir.) which concerns missing assets and liabilities and states that,

> "a separate net worth analysis and a separate indictment, is made for each year." *id.* at 1012 , and that, "an accounting error in one net worth compilation does not affect the analysis for the succeeding year unless the error concerns an asset that is present in both years or credit or loss carryovers". *Id.* at 1012.

Yet trial counsel in relying on *Merritt* and the *Manual* had not undertaken to show "accounting errors" in "each year", under the stated belief that the government Agent Lee testimony had failed to identify those stated missing assets and liabilities and the burden remained with the government not the defendant to identify missing assets and liabilities. Neither trial attorney asked Agent Lee what she left out of the schedules. The trial attorney closing statement to the jury drawing an analogy to one baseball game displayed the application of *Merritt* and the *Manual* instead of *Keller*, since there would be five separate baseball games under *Keller*.

The appellate decision also brought to light the ninth circuit *Keller* decision never cited by defense trial or appellate counsel which was evidence that trial counsel had conducted the trial in disregard of this crucial trial circuit law which would have necessarily controlled the production of defense evidence at trial into showing "accounting errors" in "each year" of indictment.

Therefore, by not citing or addressing *Keller* and omitting *Merritt* and the *Manual*, the appeals attorney omitted the crucial issue of who had the burden of proof to identify missing assets and liabilities once Agent Lee

testified as to missing assets and liabilities in the calculations, much less the existence of the defendant burden to show "accounting errors" in each year of the computation . In so doing there was no coherent basis on appeal for 1996 and 1998 since no accounting errors were shown or allocated into those two years during the trial, and only a *Merritt* and *Manual* burden of proof analysis of Agent Lee's testimony could be used to appeal those two years.

In studying the issues for appeal the appeal attorney incontrovertibly would have realized that the trial attorney had integrated a fifth circuit standard of evidence as adopted by the Justice Department *Manual* into a ninth circuit trial which was inconsistent with ninth circuit law upon the failure of the government to identify assets and liabilities Agent Lee said were missing from the net worth calculations. Encountering this issue would have required the appellate attorney to brief the trial record and argue the application of the fifth circuit burden of proof standard of *Merritt* as adopted by the *Justice Department Criminal Tax Manual* when confronted with the Agent testimony as relied upon by the trial attorney. Both have never been addressed in the ninth circuit.

The *Shang* appeals court in applying *Keller* reversed one year (1999) due to a number of "accounting errors" that were shown at trial to be in the 1999 net worth year. Pet. App. 17a. The appeals court concluded that the "computational error" for 1999 was great enough to be "downright inaccurate". *Id.* At a minimum, "Forty percent" computational error was found to be "downright inaccurate", because of the number of omitted assets and liabilities in the 1999 calculation. *Id.* The *Shang* appeals court arrived at this analysis where the appeals counsel neither cited or argued the issue of accounting errors or burden of proof and where the appeal never even mentioned *Keller*. The 1996 and 1998 years were upheld

on appeal because there were no errors shown at trial in those years. *Id.*

The *Shang* appeals court did not address the *Manual* at all since it was not mentioned in the appeal brief or at oral argument. Pet. App.16a-18a.

C. The Habeas Corpus Petition

Defendant filed a petition seeking habeas corpus relief based upon an infringement or denial of his constitutional right to effective assistance of counsel at trial and on appeal guaranteed by the *Sixth Amendment.* Defendant alleged that trial counsel had applied *Merritt* which was adopted by the *Justice Department Manual* instead of undertaking the burden of proof to submit evidence of calculation errors at trial in each year as required by *Keller*, under the erroneous belief that the burden of proof "remains entirely ... on the government" and "never shifts to the defendant".

Defendant's habeas petition showed additional errors, communicated to his trial counsel, contained in the 1996 and 1998 years of indictment where the evidence was already in the possession of the government and could have easily been noted at trial by simply questioning Agent Lee. These errors met or exceeded the "downright inaccurate ... 40%" amounts in each of the government net worth calculations for the 1996 and 1998 years.

The 1998 net worth calculation of $125,306 contained errors which were not noted at trial of a $20,514 error missing from the government calculation which was an accounting error within the government's own schedule not requiring any external testimony or evidence from defendant. Pet. App. 12a. Another error for 1998 involved $27,670 in checks in the possession of Agent Lee, involving an asset acquired in the 1997 year which would reduce the 1998 computation by that amount. *Id.* Both items were not in the IRS calculations. The IRS did not dispute that these two errors alone would reduce the 1998

net worth computation by 40%. The IRS also did not dispute that the errors were valid errors in the 1998 calculation.

Therefore a "downright inaccurate" government calculation meeting the appeals court decision for computational error and reversal, was used by the government to obtain a criminal conviction for the 1998 year where the percentage error approached 40%.

The remaining 1996 year of conviction concerned a smaller amount of $24,838 in net worth. The Defendant's habeas petition alleged that the sale of an automobile and a carryover of a loss from the 1995 tax year were not introduced into evidence which would have reduced the 1996 tax year net worth to almost zero. Again, such evidence was not allocated to 1996 although presented in general terms at trial, because the trial attorney did not know that the burden of proof had passed to the defendant to allocate accounting errors to the 1996 year. The government did dispute the car sale but only as to which year and the amount, and the application of a carryforward loss from the 1995 year in the habeas petition, but did not dispute that they were not introduced at trial to apply to the 1996 year. Pet. App. 11a. All the 1996 errors exist in the trial record and are observable from the trial evidence but cannot be determined by the record as either to amount or allocation to the 1996 year.

Again, a "downright inaccurate" government calculation exceeding the appeals court decision for reversal, was used by the government to obtain a criminal conviction for the 1996 year where the percentage error exceeded 40%.

Significantly, other errors exist but are not part of the trial record at all, simply because the trial attorney believed the burden "remained with the government" and "never shifts to the defendant" to identify any accounting errors at all, much less to allocate those errors to specific years, because of the Agent Lee testimony. Because those errors were not in the trial record, they were only

briefly mentioned in the habeas petition to show that all the net worth calculations for each year were reducible to near or almost zero.

The habeas corpus petition alleged that the appellate attorney was ineffective in failing to propound any coherent appeal with reference to the 1996 and 1998 years where the appeal did not refer in any way to the burden of proof issue stated by Agent Lee's failure to define what assets and liabilities she left out of the calculations. The trial record of the trial attorney's reliance on *Merritt* and the *Justice Department Criminal Tax Manual* which adopted the *Merritt* burden of proof standard at trial were also not mentioned by the appeal attorney. Since the record stated the trial attorney relied on *Merritt* and the *Manual*, it was incumbent upon the appeal attorney to appeal the trial record since it was the basis for the failure to introduce defense evidence of accounting errors in the 1996 and 1998 years.

The district court in denying the habeas corpus ineffectiveness of trial counsel argument stated that, "Mr. Shang has not demonstrated that trial counsel relied on *Merritt*, other than in the motion for acquittal." Pet. App. 12a. The district court did not address the fact that neither government or defense trial attorney asked Agent Lee what she left out of the net worth calculations, which is a clear indication of the application of the *Manual* and *Merritt*. *Id.*4a-14a. No evidence exists as to what she was talking about. The district court stated that, "if trial counsel failed to introduce evidence of specific unjustified omissions for 1996 and 1998, the best explanation is that the attorney never knew about them." Pet. App. 12a. Although this would seem to be more reason to have asked Agent Lee what she left out of the schedules, the district court found the trial counsel use of *Merritt* "reasonable." *Id.* at 9a. The district court stated, "The appellate counsel did, however, mention *Merritt* in the briefs." *Id.*at 13a. Although the "mention" the district court referred to was a simple line cite without analysis.

The district court concluded, "Some things must be left out". *Id.*

The district court did not analyze the *Manual* at all, but found as fact that trial counsel "relied heavily" on the "*Department of Justice Criminal Tax Manual.*" *Id.* at 9a.

The appellate court in the habeas corpus proceeding also decided without analysis that the appellate attorney usage of *Merritt* was "appropriate", and the attorney's choices regarding how to make use of *Merritt* were also "highly reasonable." *Id* at 1a-3a.

The appeals court also did not analyze the *Manual* at all. *Id.*

REASONS FOR GRANTING THE PETITION

This case requires granting the petition on important and equally compelling grounds.

First, it addresses the fundamental misuse of evidence by the government and reliance by the defense trial attorney on the government *Manual* during trial. Judicial supervision of the administration of the criminal justice is required to maintain standards of procedure and evidence governing trials so that the use of erroneous evidence will not escape the adversarial process when neither government or defense trial attorneys believe they have the burden to identify errors stated to be in the evidence. A denial of a defendant's constitutional rights and a miscarriage of justice has occurred for reasons that cut to the heart of the adversarial system of justice.

Second, hundreds of thousands of trials and appeals are performed in the United States each year. Yet the standards for practice in trial and appeal remain vague in the minds of the bar, the courts, and the public. This case addresses the existence of those standards in both forums of justice and if they are enforced.

Third, the government elected to not follow its *Manual* at trial. This places the government in a position of control, gamesmanship, and unfair advantage at the

crucial trial stage of the adversarial system, and when the government is confronted with an unjust or improper prosecution it may then "option" to not follow its *Manual* and shift the burden of proof issue from the *Manual* to the law of the circuit of the defendant, in the hopes of salvaging an unjust prosecution.

Fourth, this court must maintain standards of evidence sufficiency when confronted with clearly insufficient evidence.

Fifth, there is an erosion of the principle to account for all assets and liabilities stated by the Supreme Court in *Holland*.

Sixth, the lack of government training, supervision, review, and preparation of the net worth are at the heart of this case and a government agent's performance as required by the *Manual* embodies protection for the public and guidelines for the agents. Judicial oversight is necessary to establish accountability when the *Manual* is not followed or else the *Manual* is rendered meaningless.

Seventh, by its very nature the *Manual* has escaped trial and appellate judicial review. As this case illustrates the *Manual* escapes judicial review. Even defendant's own appellate attorney does not address the *Manual*, even though his trial partner has "heavily relied" on the *Manual*. Pet. App. 9a. Courts necessarily apply the law and the *Manual's* place in a trial governed by the law of the circuit, is vague and arguably beyond the jurisdiction of the law of the circuit trial and appellate courts. However, manuals that subvert the adversarial nature of the trial by falsely representing government obligations at trial must be placed under judicial scrutiny to insure integrity and protection of administration of justice. No review other than Supreme Court review is available for this protection, especially when the *Manual* transcends all circuits and implements *Holland* principles.

I. The Circuits Are Divided And The Conduct Of Trial And Appellate Counsel Present Reoccuring Issues of Great Practical Importance

A. The Circuits Are Divided

This case raises the issue of conflicts between all circuits other than the fifth circuit, not only because the *Manual* is used for federal government prosecutions nationwide, but because the *Manual* and *Merritt* are in conflict with basic common law principles existing nationwide, when proof of innocence (i.e. missing assets and liabilities in the net worth calculation) is now made part of the government burden of proof.

Here you have two different conflicting opposite circuit decisions on exactly the same testimony by the government. The conclusion of law by the *Manual* and the fifth circuit is that the government has failed to meet the burden of proof by failing to identify the assets and liabilities stated by the government to be missing in the net worth and the conviction is reversed for an insufficiency of evidence. The ninth circuit conclusion is that the burden is with the defendant to show missing assets and liabilities in each year of indictment.

Same testimony in both cases but opposite results of law.

The conflict is truly one of principle as well as in decision. Certainly by citing the case as a "clear lesson" within the government *Manual*, there arises an implicit recognition that the principle is worthy of recognition; teachable to all government agents nationwide; of wide dissemination to non-government practitioners nationwide; clearly clarifying any pervasive confusion; and because it is a "lesson", not merely one of aspiration; but to be recognized and adhered to for the judicial treatment it received. Not by coincidence, the *Manual* and *Merritt* are the progeny of *Holland*.

The conflict between the circuits arise only where the government agent does not put into practice the "lesson" to identify the missing assets and liabilities she refers to and justify their omission from the net worth schedules. At that time and that time only, a conflict between the circuits arise. Both the government proof of missing assets and liabilities from the net worth calculation and ability to create a circuit conflict, now become optional; all to the unfair benefit of the prosecution's case.

B. The Ineffective Assistance of Trial Counsel Presents A Recurring Issue of Great Practical Importance

This Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L..Ed.2d 471 (2003). In a divided decision, this Supreme Court referred to the *ABA Standards for Criminal Justice* as a guide to determine attorney conduct. *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) . The *ABA Standards for Criminal Justice* 3rd Edition (1993) at Standard 4-4.1 states that,

> "The lawyer's duty is to determine from knowledge of all the facts and applicable law, whether the prosecution can establish guilt." *Id.* at 182 .
>
> "Effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such

mechanisms as cross examination..." *Id.* at 183.

The district court stated that defense trial counsel "relied heavily" on the *Department of Justice Criminal Tax Manual*. Pet. App. 9a. The *Manual* is clear that the government has the burden to identify and justify the missing assets and liabilities that Agent Lee testified were missing from the calculations. The appeals court in the habeas corpus proceeding decided that trial counsel had relied upon *Merritt* and that the reliance was "objectively reasonable". Id. at 3a. If these findings are taken as correct, then trial counsel was effective in knowing that the burden of proof did not rest with him to identify missing assets and liabilities in the Agent Lee testimony and he was correct to not cross-examine agent Lee as to what was missing from the calculation. However, the appeals court in applying *Keller* decided that the defendant failed to show asset and liability errors in 1996 and 1998 and allows those convictions to stand. In essence counsel was made "effective" in failing to cross-examine Agent Lee, by his knowledge and application of the *Manual*. This issue is reoccurring in future trials when defense counsel can be made "effective" in failing to cross-examine whenever the government chooses not to follow its *Manual*, leaving defense counsel erroneously believing that he does not have the burden of proof , when he actually does. This would arise only in those cases where the government prosecution is unjust.

Thus the *Manual* eviscerates the adversarial system of justice.

C. The Ineffective Assistance of Appellate Counsel Presents A Recurring Issue of Great Practical Importance

ABA Standards for Criminal Justice at 4-8.4(b) state, "Appellate counsel should be accurate in referring to the

record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument." *ABA Standards* at 242.

> "In presenting the facts and issues to the appellate court in the brief and on oral argument, the lawyer must confine himself or herself to the record made in the trial court and carefully observe the distinction between recorded matter and argumentation." *Id.* at 243.

> "Under no circumstances should counsel refer to or rely upon matter that is completely extraneous to the record made in the trial court and beyond the scope of the doctrine of judicial notice. This is improper for the same reason that deviation from the record would have been improper in closing arguments at trial. An appellate court's function is limited to the review of what took place in the trial court. In an appellate court, the lawyer must take the case as it was tried and on that record alone." *Id.* at 244.

In the facts at bar, the appellate attorney knew from the record, that the trial attorney stated he had relied on *Merritt* and the *Manual* in written Rule 29 motion. The Rule 29 motion was at the conclusion of the government evidence after Agent Lee testified. The appellate attorney knew from the oral Rule 29 record that the trial attorney stated Agent Lee's testimony was defective and in the closing argument that the government had not met the burden of proof and the burden had not passed to the defendant, and that there was only one case of accounting errors, not five.

This record is and can only be a reliance on *Merritt* and the *Manual*. There is no other authority for the trial record. Not only did the appeals lawyer fail to "confine himself to the record made in the trial court" by not referring to those citations, but he "relied upon matters extraneous to the record", and did not cite *Merritt* or the *Manual* or the burden of proof issue at all. The appeals attorney was not "accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument."

The reason that the appeals attorney failed to appeal the *Manual*'s adoption of *Merritt* and *Merritt* testimony is because the *Manual* is arguably not cognizable authority compared to the law of the ninth circuit. By it's very nature it is a lesser authority.

The appeals court decision in the habeas corpus concluded that the appellate attorney made "appropriate" legal arguments but it does not address the *Manual* at all. Pet. App. 3a.

The *Manual* simultaneously eviscerates the adversarial appellate system to the detriment of the accused, and also escapes appellate review.

II. This Case Squarely Presents the Fundamental Issue of Reasonable Reliance On The Department of Justice Manual And of Judicial Supervision of the Criminal Justice System to Maintain Standards of Procedure And Evidence When Confronted With Insufficient Evidence.

A. This Is A Case In Which The Due Process Clause Is Implicated When Defendant's Trial Counsel Reasonably Relies On the Department Of Justice Manual and Defendant Has Suffered Substantially Because of Misconduct By The Justice Department.

The *Manual* requires that the government trial attorney ask the agent what items she stated were omitted and why they were omitted from the net worth calculation. The *Manual* states, "the lesson is clear". The authority for the lesson is stated to be *Merritt*. *Merritt* holds that the burden remains with the prosecution to identify items stated to be omitted from the net worth computation. That is the "clear" lesson. The trial attorney reliance that the burden did not pass to defendant is reasonable based upon the "clear" lesson and affected the presentation and conduct of the defendant's trial evidence where trial counsel was entitled to rely that the *Merritt* lesson applied and that the burden remained with the government to show accounting errors and that the government could not go forward.

The *Manual* explicitly and implicitly contains this representation where the "lesson" is stated without warnings of limitations on use or dissemination. No *Manual* statement exists that the evidence or lesson is "optional". The *Manual* does not state, "for internal use and discussion only", or suggest that the statements are aspirations. To hold otherwise renders the *Manual*, "actively" misleading.

Due process of law prevents a criminal conviction where there is reasonable reliance on the *Manual*. The Supreme Court has intervened in similar cases. (The reversal of convictions of individuals for refusing to answer questions asked by the state where the state has erroneously provided assurances, express or implied, that the defendants had a privilege under law to refuse to answer. *Raley v. Ohio*, 360 U.S. 423, 437-438. Conviction reversed where defendant alleged Department of Justice failure to give him a resume of FBI report, deprived him of fair hearing. *Simmons v. United States* 348 U.S. 397, 75 S.Ct. 397, 99 L.Ed. 453. And in *Cox v. Louisiana* 379 U.S. 559, the Court has held that an individual could not be punished for demonstrating "near" a courthouse where

the highest police officials of the city had advised the demonstrators that they could meet where they did without violating the statutory proscription against demonstrations "near" the courthouse.)

Indeed the situation created is a "catch-22" necessarily creating a defendant's conviction based upon materially incorrect evidence where that evidence is not placed in controversy because of the government's failing to identify missing assets and liabilities and the "heavy reliance", Pet. App. 9a, on the *Manual* by defense, as to who had the burden of proof to identify accounting errors to begin with. The testimony escapes the crucible of the adversarial system. Moreover, the defense should not be obligated to assume the stated obligations of the prosecution and in so doing defy the dictates of the adversary system and the justice department itself, in an attempt to cure defective government evidence, and in so doing undertake the *Manual* statement of the government obligation of proof.

B. Irrespective of Reliance Issues Supreme Court Supervision of the Administration of The Criminal Justice System Is Required To Maintain Standards Of Procedure And Evidence When Confronted With Insufficient Evidence

Regardless of the conduct of defense trial and appellate counsels, the government evidence is fundamentally insufficient and fundamentally deficient for the government to go forward with.

This conclusion is reached for exactly the same reasons stated by the *Merritt* Court when confronted with the same testimony:

> "There is nothing in the record of this case to indicate what assets the special

agent was referring to." *Id. Merritt.* 327 F.2d at 822.

"Nevertheless, to assume that the Special Agent was referring to this particular item is a matter of pure speculation." *Id.*

"There is no way for this Court to determine whether these assets were realty or personalty , or whether they were disposed of during the years in question." *Id.*

"In *Holland* the Supreme Court stated the requirement... that an *essential* condition is the establishment.. of net worth... The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion *of all assets* ... 348 U.S. at 132." (emphasis added by the court). *Id. Merritt* at 821.

"The disposition of this appeal, then, is dependent upon whether the burden of going forward with the evidence was on the Government or the Defendant. We conclude that the burden was on the Government to identify these assets and to justify its failure to include them in the net worth calculation." *Id* at 822.

In analyzing the testimony, the *Merritt* court quotes *Holland* 348 U.S. at 138, 75 S.Ct. at 136-137, 99 L.Ed. 150, and adds its own emphasis to *Holland*'s own words, "**Once the Government has established its case**, the defendant remains quiet at his peril. ... This would

include listing or accounting for all assets of the taxpayer of which the government is aware." Clearly the analysis of the testimony is that the government has not established its case by testimony that fails to account for all assets and liabilities of the defendant or justification as to why those items are omitted from the calculations. It ignores the simple fundamental crucial fact of this case that no matter what defendant or prosecution evidence is produced, it is impossible to determine the missing assets and liabilities evidence referred to by Agent Lee other than to ask her, and that did not occur. The *Manual*'s adoption of *Merritt* is the adoption of a minimum standard of evidence.

In applying *Merritt*, no court can speculate on what Agent Lee would reveal as to what she failed to include whether assets or liabilities. Without identifying the assets and liabilities stated to be missing in the net worth equation, and justifying why they are omitted, the calculations are rendered meaningless. The district court finding that the evidence is sufficient to convict, Pet. App. 22a, presumes testimony that does not exist in the record and therefore presumes evidence. The net worth calculations are fundamentally unsound and insufficient as any evidence where the government prosecutes upon testimony stating the existence of missing assets and liabilities.

Using 20-20 hindsight, the fact that alternating three of the five years were thrown out by the jury and the appeals court and that the remaining two years now have conceded large material calculation errors evidenced in the record only proves the insufficiency of the net worth calculations as testified to by Agent Lee and confirms the conclusion reached from her testimony that the omissions in liabilities and assets were significant in amount rendering all net worth calculations "downright inaccurate".

The net worth evidence turns on the testimony of the creator of the figures as to its insufficiency and rests

upon the calculations as represented are not worthy of going forward with. Neither prosecution or defense posed any question to find out what assets or liabilities Agent Lee was talking about. As stated *in Holland* , 348 U.S. at 135 "... it is within the province of the courts to pass upon the sufficiency of the evidence to convict.". The facts as presented require the conclusion that the evidence is insufficient to convict. *Washington v. United States*. 357 U.S. 348, 78 S.Ct. 1373, 2 L.Ed2d. 1368, conviction reversed for insufficient evidence.

As stated by this Court in *Holland 348 U.S.* 125, the net worth method is "fraught with danger for the innocent that the courts must closely scrutinize its use", and "involves something more than the ordinary use of circumstantial evidence". *Id.* at 124. By allowing the government to fail to clarify the testimony allows the method to become even more dangerous by rendering the evidence incapable of clarification since neither government or defense believe they have the burden of proof.

This Court's authority is stated in *Holland, id.* at 136 at footnote 7, "This court will formulate rules of evidence and procedure to be applied in federal prosecutions where it appears necessary to maintain proper standards for the enforcement of the federal criminal law in the federal courts." *McNabb v. United States*, 318 U.S. 332, 341, 63 S.Ct. 608, 613, 87 L.Ed. 819. *Holland* first required all assets to be included in the net worth. *Id.* 348 U.S. at 132. The *Merritt* Court applied the rule to government testimony stating missing assets. This was adopted by the government *Manual* and relied upon by the defense. The rule of evidence and procedure must now be enforced to "maintain proper standards for the enforcement of the federal criminal law". Proper standards for the enforcement of the federal criminal law should require that the government adhere to its own *Manual* requirements.

As *McNabb* 318 U.S. at 341 states, "In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, this Court has, from the very beginning of its history formulated rules of evidence to be applied in federal criminal prosecutions." Now in its supervisory authority over administration, the Supreme Court must clarify the relationship between the *Manual* and circuit law and eliminate the systematic future miscarriages of the justice system which allows the government to "option out" of *Manual* requirements at trial. In doing so the effectiveness of implcmenting Supreme Court pronouncements will also be enhanced in communication and in implementation by creating uniformity among circuits.

III. THE DECISION BELOW IS INCORRECT

A trial must bring forth evidence in an adversarial proceeding for an adjudication. Here you have the government's own testimony that evidence is missing. It is the equivalent to government testimony in a murder trial stating that there is evidence of guilt and innocence and then neither attorney questions the testimony of the innocence evidence in the mistaken belief that neither have the burden of proof. The unclarified government testimony renders the government proof insufficient. The trial evidence only becomes more deficient where the defense attorney does not request or submit evidence of missing assets and liabilities in the belief that the burden of proof has never been passed from the prosecution to do so because of clearly stated *Manual* requirements.

Whether it is the fault of the prosecution or the defense, are explanations for the defective record which do not detract from the fundamental fact that the testimony which is the basis for the prosecution of a net worth case , is defective.

In the final analysis, defendant was deprived of due process of law by misrepresentation and a failure of the adversary system by assistance of counsel made ineffective in fact. This arises not only in being misled by government pronouncements stating the government burden of proof but also in the failure of presentation of evidence by a defense trial lawyer who applied the *Manual* and did not apply the law of the circuit and an appeal attorney who obscured this fact from scrutiny on direct appeal. It is an application of dominos and where the first domino is the *Manual*, all other dominos will fall once the government knocks over the first domino by ignoring the *Manual*. A conviction will necessarily occur without enforcement of the *Manual*.

A summary reversal is required. To hold otherwise will not bring trials based upon evidence but will erode the justice system by allowing the government to go forward with all criminal prosecutions just and unjust, knowing some cases to be deficient in evidence , and to misuse the *Manual* to obtain a conviction knowing there is no accountability for disregarding the *Manual*: relying instead, on misleading defense attorneys some of which may have mixed motives to argue the client's case. This matter presented to the Supreme court defies *Holland* and presents a case entirely inconsistent with the "position long espoused by the government, that it's duty is not to convict but to see that justice is done." *Holland* 348 U.S. 121, 136.

Now additional errors are brought to light that show the remaining two years of conviction to be "downright erroneous" meeting the appellate decision criteria for reversal. The alternating 3 years have failed based on the evidence. What other decision can be reached other than Agent Lee correctly stated the calculations were missing assets and liabilities? What other conclusion can be reached other than all the convictions were based on insufficient evidence? What other conclusion can be reached other than once the government failed to follow

the *Manual*, the trial became a trial based on the failure of evidence, not the proof of evidence? In the final analysis what is known is that no one asked Agent Lee what she left out of the schedules. In effect she became judge and jury of the omitted evidence contrary to the pronouncement by the Supreme Court in *McNabb* 318 U.S. at 343, "The awful instruments of the criminal law cannot be entrusted to a single functionary".

Whether she succeeds as executioner depends on this Court.

CONCLUSION

The petition for a writ of certiorari should be granted. Petitioner requests a summary reversal.

Respectfully submitted,

Wade Vincent Shang
In Pro Se
Wade Vincent Shang
103 Parkgrove Drive
South San Francisco, Ca. 94080
(415) 722-1638

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